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Notes on the Revenue Act of 1928

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The Revenue Act of 1928 has little substantial interest or profit for the average individual taxpayer, and not much for the corporate taxpayer. Corporations benefit by a reduction in the rate of the income tax to 12 per cent, and it has been grudgingly conceded that an individual may "earn" in excess of the former limit of $20,000, although Congress still does not believe that an individual can earn more than $30,000. The arrangement of sections in the income tax act has been somewhat simplified, at the sacrifice of an organization familiar through ten years use. The bulk of the important changes have to do with the administrative provisions of the income tax, and with substantive provisions that do not affect the average taxpayer.

With the elimination of the automobile tax, the increase of exemptions of the admissions and dues taxes, and the repeal or wholesale reduction of the taxes on certain foreign built boats, cereal beverages, and grape brandy used in fortifying, the income tax has almost a complete monopoly of the attention of a federal tax specialist.

Since a considerable number of the new provisions which will vitally affect particular taxpayers are discussed in detail in another article in this issue, it will only be necessary here to indicate a few to show the major trends of the new act.

One category of changes includes those designed to end ambiguities and uncertainties. Of this sort are the new provisions more specifically setting forth the basis in the case of property transmitted at death (Sec. 113 (a) (5)); the new installment sales sections (Sec. 44 and 705); and the restriction of the deduction of estate and inheritance taxes to the estate (Sec. 23 (c); cf. 703). Two other changes were apparently intended to fall into this class, but in fact give rise to new doubts. Although the act validates waivers in respect of taxes for prior years executed after the expiration of the period of limitations, if executed between the date of passage of the new law and January 1, 1929, the act is silent as to waivers executed *after* the latter date, and expressly does not apply to waivers executed under such circumstances before the law was approved (Sec. 506). Likewise the invalidity of waivers in respect of taxes imposed by the 1928 law, executed after the limitations period has expired, is allowed to rest upon mere inference (Sec. 276). Again, there have been doubts as to the computation of gain or loss on the sale of property acquired by a corporation from another corporation with which it was affiliated. The new law provides that the basis shall be determined "in accordance with regulations prescribed by the Commissioner with the approval of the Secretary without regard to inter-company transactions in respect of which gain or loss was not recognized" (Sec. 113

(a) (12)), thereby giving taxpayers little certainty, at least for the present.

The desirability of the policy of increasing the certainty of a tax law does not need to be argued. So far as the specific problems mentioned above are concerned, troublesome litigation is probably eliminated in the first three cases, left in *statu quo* in the fourth, and perhaps encouraged in the fifth. There is doubt as to the wisdom of some of the changes on other grounds, elsewhere considered.

A second category consists of changes designed to eliminate loopholes in the present law. The major example is the elimination of the exception of one type of exchange of securities for securities contained in the reorganization basis provisions of the 1924 and 1926 laws. (Sec. 113 (a) (7) and (8)). This loophole, which permitted the stepping-up of the basis in a reorganization, was called to the attention of the Treasury in the winter of 1925 by Colonel Montgomery in his *1926 Income Tax Procedure*. The principal objection to the new provision is that it purports to change the basis in the case of the securities affected, even though the exchange occurred eight or ten years ago. If such property is now sold, an additional tax liability will be imposed, which was wholly unpredictable at the time the transaction was carried through.

There are the usual additional exemptions to fit special cases. Among them are those conferred upon real estate boards (Sec. 103 (7)), employees beneficiary associations (Sec. 103 (16)), teachers retirement fund associations (Sec. 103 (17)), the salaries of teachers in Alaska and Hawaii (Sec. 116 (b)), and the income of a foreign central bank of issue from bankers' acceptances (Sec. 119 (a)).

Finally a large number of changes were designed to improve the administration of the law in particular details. The more important of such changes were originally proposed by the Joint Congressional Committee. Provision is made for the release of tax liens where the Treasury has or is given other sufficient security (Sec. 613). Transferees of property who are being subjected to liability for the transferor's taxes are given powers to examine the books and papers of the transferor, and in such cases before the Board, the burden of proof to show that the petitioner is liable as a transferee is placed upon the Commissioner (Sec. 602). The provisions for final closing agreements are somewhat liberalized (Sec. 606), as well as those for the extension of time for paying deficiencies (Sec. 502). The taxpayer is given delayed justice in the case of refunds, by the provision allowing interest up to a date not more than 30 days preceding the date of his check (Sec. 614).

The bill was greatly improved between the time of its passage by the House and of its transmission to the President for his approval. The House bill abounded in retroactive provisions, some of which, unfortunately, remain; and in general its new provisions showed small consideration for the taxpayer. The Senate Finance Committee wisely delayed action sufficiently to allow discussion of the bill before bar associations and accountants' societies, and appearances by experts before the committee. In this way many of the objectionable features of the bill became known and were eliminated; and provisions not fully considered were more carefully drawn.

Income Tax Act of 1928
Comments on the Principal Features

By J. Marvin Haynes, C. J. McGuire and W. C. Magathan

We have a new Federal tax law. The President signed the bill at 8:00 A. M., Tuesday, May 29, 1928. The purpose of this issue of the Journal is to point out briefly its principal features and its differences from existing law in so far as income taxes are concerned. Obviously it is impossible to cover all details and make complete comment, even on the income tax, in this article. No space whatever can be given to the other classes of taxes covered by the Act.

The income tax title, which is officially named "Income Tax Act of 1928," is effective as of January 1, 1928, except that Sections 146 and 151 take effect as of May 29, 1928, the date of enactment. These sections relate to certain penalties, which were already in existing law. There was some hope when the bill was being considered by the Senate that one very wholesome difference between the "Income Tax Act of 1928" and the 1926 Act would be its comparative lack of retroactive provisions. The 1926 Act is one of the worst examples of the use and abuse of the power of Congress to pass retroactive legislation. The present bill as it emerged from the House Ways and Means Committee was another such Act. The Senate Finance Committee eliminated many of the retroactive provisions of the House Bill. Nevertheless, after the Act is carefully considered and the work of the Conference Committee observed, it is a question as to whether this bill is not worse than its immediate predecessors. Form and rates are one consideration and justice is another. Congress for some reason seems to confuse the two. Much ado is made about rates and simple form, but when one finally digs under the subtle language, it is found that in correcting errors Justice is one-eyed and can see only the Government's case.

At this point a practice which seems to be creeping into the framing of our tax bills must be commented upon. This is the fact that the Secretary of the Treasury is permitted to have a special representative present at all proceedings on the bill. This permission even extends to the Conference Committee. It should go without saying that this constitutes a form of lobbying just as much as though the individual concerned were not a representative of the Government. It is in fact a tacit violation of that cardinal principle that the three branches of the Government are separate and one acts as a check upon the other. Clearly, if the Secretary of the Treasury has the privilege of representation at all times, participating actively in the framing of the bill, citizens who are also in an equal position to give expert advice on difficult matters of legislation, should be represented. This is especially true of the Conference Committee where the public deliberations of the two Houses on the Act are so vitally modified. Either its deliberations should be public, or the Treasury representative should be excluded, or both the Treasury repre-

sentative and the public representatives should be admitted. The present practice constitutes Government lobbying without any other name.

Form of Act

At first glance this new law seems a radical departure from preceding acts. When, however, it is carefully studied it will be seen that what appears to be a complete change in the law is little more than a change in form. The draftsmen of the Act have taken the law as found in the Revenue Act of 1926, and, in the majority of instances at least, have regrouped its sections and subsections, without change in effect, according to a plan of arrangement which Congress at least believes will simplify the understanding of the law by the taxpaying public as a whole.

This plan of rearrangement was formulated by the Joint Congressional Committee on Internal Revenue Taxation and to a surprising degree follows the plan of presentation in Colonel Montgomery's *1927 Income Tax Procedure*. The Committee after some study determined it was impossible in one fell swoop to simplify the tax laws without creating uncertainty and hardship. They said what Colonel Montgomery has again and again said, that you can not have a simple tax law until the basic provisions are simplified and the cumbersome administrative requirements are eliminated. These changes they hold can come only after extensive study and they hope this study will ultimately lead to a code of Federal tax administration. When this has arrived Congress can effect tax revision by a simple law merely changing the rates and incorporating necessary changes in the code by way of straight amendments.

The Committee did feel, nevertheless, that some results could be obtained by a rearrangement of the income tax title, and this has been done in accordance with the plan recommended. The plan is based on the truth that the great majority of the taxpayers are interested in only a small part of the law. Probably ninety per cent of the taxpayers who file returns under this Act will find in the General Provisions of Title I-Income Tax, practically all of the income tax statute law of interest to them. Therefore, the basic provisions, such as those relating to gross income, deductions, net income, credits, returns and payment which apply to all taxpayers, have been placed at the beginning of the Act. These are classified as "General Provisions" which cover the ordinary transactions. Those provisions applying to the special ten per cent of taxpayers and for extraordinary and occasional transactions are brought together in the next general part of the Act under the classification of "Supplemental Provisions."

The Committee further concluded, as Colonel Montgomery has been doing after the passage of each successive act, that one of the most serious complications in the several revenue acts is that each one attempted to cover the determination, assessment, and collection of taxes arising under all preceding statutes by repealing those acts and incorporating their provisions with amendments. With this in mind, the Income Tax Law of 1928 covers only taxes on incomes from January 1, 1928. The 1926 Act has been retained as a law and such changes as were deemed essential have been incorporated in the new law under a specific title of "Amendments to 1926 Income

Tax." In dealing with the new Act, this change must always be kept in mind.

Aside from the rearrangement of the Act, there has been a change in the manner of printing which is most helpful. Heads and subheads are freely used and the printing is broken by proper identations to make the statement of the law clear.

Rates of Tax

Corporation taxpayers have been the principal beneficiaries of the income tax act as passed. The House proposed no reduction for individuals, giving all of the benefit to the corporations. The Senate in its bill increased the corporate levy over the House Bill and gave the benefit principally in reduced surtax rates to individuals with incomes ranging from \$20,000 to \$80,000. This change did not stand in conference and the rates for individuals are identical with those of the 1926 law. The new rates are not retroactive to January 1, 1927 as was proposed in the House Bill. They take effect as of January 1, 1928.

For corporations the House provided a rate of 11½ per cent, with an increase in the exemption to \$3,000. It also provided for a tax on small corporations graduated to 9 per cent if taxable income was not more than \$15,000. The Senate increased the rate to 12½ per cent without the graduated feature, leaving the exemption at \$3,000. In conference the rate was placed at 12 per cent, without the graduated feature, and so adopted in the Act.

The rate on life insurance corporations was reduced from 12½ per cent to 12 per cent. In the 1926 Act the rate for life insurance companies was one per cent lower than for other corporations. This difference does not exist in the 1928 Act.

Section 144 changes the rate for withholding on tax-free covenant bonds in cases where the obligor agrees to pay or reimburse the tax imposed upon the obligee or to pay the interest without deduction for taxes. In such cases it is provided that the rate shall be 2 per cent. It is provided further that if the liability assumed by the obligor does not exceed 2 per cent of the interest, then the deduction and withholding shall be,

1. 5 per cent for non-resident alien individuals or a foreign partnership.
2. 12 per cent for foreign corporations.
3. 2 per cent for all others, unless taxpayer is subject only to the 1½ per cent tax.
4. If the owners of the obligations are not known to the withholding agent, the Commissioner may authorize withholding at 2 per cent; or, if the liability of the obligor in such cases does not exceed 2 per cent of the interest, 5 per cent.

The 1926 law provides a rate of 5 per cent for non-resident aliens or a foreign partnership, and a rate for foreign corporations equal to the income tax rate with a proviso that if the obligor agrees to pay interest without deduction of tax, then the rate is 2 per cent. The amendment permits the Government to collect the full rates of tax from the foreign owners of the tax-free covenant securities without penalizing the citizen obligor.

The withholding rates for income derived within the United States by

foreign corporations subject to withholding at source, are changed in Section 145 to conform with the changes in rates for domestic corporations. The rate for payments made prior to the effective date of the Act is 13½ per cent (the 1926 corporation rate) and for payments made after the enactment of the 1928 Act 12 per cent (the 1928 corporation rate). The rates for income from tax-free bonds are covered above in Section 144.

Application of Tax

Exempt Corporations

Four new groups of exempt corporations have been added in the new law. These are:

- Real estate boards (Sec. 103 (7));
- Finance corporations for farmer's cooperative associations (Sec. 103 (13));
- Voluntary employees beneficiary associations (Sec. 103 (16));
- Teachers' retirement fund associations (Sec. 103 (17)).

By Section 707 Congress has finally corrected an error that has existed since the 1918 Act was repealed. This relates to the exemption from tax of the proceeds from the sale by United States citizens of vessels documented under the shipping laws of the United States and built prior to 1914. The Merchant Marine Act of 1920, provided certain conditions were complied with, exempted such sales from tax under the Revenue Act of 1918 for the ten-year period from June 5, 1920. This has now been corrected by making the exemption apply under any act in effect during the ten-year period.

Undistributed Surplus

While Section 220 of the Revenue Act of 1926, dealing with the accumulation of surplus by corporations for the purpose of avoiding surtax by stockholders, has been reworded in Section 104 of the 1928 law, there is no change in its legal effect. The house bill as it reached the Senate drastically revised this section and in the opinion of many would have made close corporations practically impossible, as well as providing for official "snooping" in private business. The Senate deemed that the effect of the arbitrary definition of personal holding companies contained in the House bill would have been "to penalize corporations which were properly building up a surplus and to fail to recognize business necessities and sound practices." The Senate further thought the present law was serving the purpose and that as the disparity between the individual and corporation rates is decreasing, the necessity for more drastic provisions is rapidly disappearing.

Taxability of Trusts as Corporations

Under prior revenue acts there have been many difficulties and conflicting decisions as to the taxability of trusts. Should they be taxed as a trust or as a corporation? In view of the conflicting rulings, trustees were handicapped in their administration and distribution of their trusts and in many instances, after having relied upon the Treasury's interpretations of the law, discovered that because such interpretations were erroneous they were susceptible in their personal capacity to liability for an additional tax. In many instances there was no method by

which the trustee could secure reimbursement from the beneficiaries to whom he had distributed the trust property. To remedy this situation Congress enacted Section 704, which is retroactive in effect.

It provides substantially that a taxpayer shall be taxable as a trust for any year prior to 1925, if it filed its return as a trust and at the time of filing, such return was in accordance with rules and regulations then in effect. It shall also be taxed as a trust if the return accorded with a ruling made subsequent to its filing, provided such ruling was in effect at the time the trust was terminated. As the situation to be remedied was largely cured by the Revenue Act of 1926 for 1925 and succeeding years, this section was made retroactive only as to years prior to 1925.

A trust may also, by an election exercised within one year from the date of the enactment of the 1928 Act, be taxed as a trust rather than an association, under the Revenue Act of 1926 or prior laws if the trust:

(1) Has a single trustee;
(2) Was created solely for the purpose of liquidating real property as a single venture. This includes taking whatever action is necessary to carry out the requirements of the trust, and distributing the proceeds.

This election may be made, however, only in the event that a return as an association has not been filed. The purpose to be served by the provision in respect of election is well set forth in the report of the Finance Committee, which reads as follows:

It was the practice in some States, antedating even the 1913 act, to subdivide and sell real estate through the agency of a trustee in the manner outlined in Section 704(b). Under the construction placed on prior laws by the department and by some of the courts such organizations may be taxable as associations or corporations rather than as trusts. In many cases the trust has long since terminated, the trust funds have been distributed, and if the trustee is held liable for a corporation tax there will be no means by which reimbursement from the beneficiaries can now be obtained. In all of these cases the venture has been taxed as a trust under former departmental rulings and such tax has been paid.

Consolidated Returns

The bill, as it emerged from the House Committee, abolished consolidated returns after 1928. A substitute was provided whereby net losses might be offset against income within a consolidated group. This substitute provision was eliminated in the House bill as passed. The apparent reason for this change was that consolidated returns afford a means for corporations to escape taxation. The Senate Finance Committee deemed this conclusion erroneous and stated that, on the contrary, consolidated returns were beneficial to both the Government and the taxpayers. As passed, the Act contains two separate sets of provisions for consolidated returns, one applying to the year 1928 and the other to the years 1929 and thereafter. The provisions as to 1928 are the same in legal effect as those in the 1926 Act.

The provisions relating to 1929 and subsequent years are different in several important particulars. The most important of these is that Congress instead of trying to write into the law all of the provisions and requisites for consolidated returns has delegated this power to the Commissioner. It is pro-

vided that "in any case in which a consolidated return is made the tax shall be determined, computed, assessed, collected and adjusted" in accordance with such regulations as the Commissioner and the Secretary of the Treasury may deem necessary in order that the tax liability of the affiliated group and of each corporation in the group, "both during and after the period of affiliation," may clearly reflect the income, and avoidance of tax liability be prevented. It is specifically provided that the corporations included in a consolidated return must consent to these regulations before the return is filed.

No one, of course, knows what these regulations may contain and apparently the provisions of the 1926 Act were made applicable to 1928 in order that the Commissioner might have sufficient time to work out the necessary rules. The report of the Senate Finance Committee indicates in the following excerpt what, in part, the regulations are expected to cover:

> Among the regulations which it is expected that the Commissioner will prescribe are: (1) The extent to which gain or loss shall be recognized upon the sale by a member of the affiliated group of stock issued by any other member of the affiliated group or upon the dissolution (whether partial or complete) of a member of the group; (2) the basis of property (including property included in an inventory) acquired, during the period of affiliation, by a member of the affiliated group, including the basis of such property after such period of affiliation; (3) the extent to which and the manner in which net losses sustained by a corporation before it became a member of the group shall be deducted in the consolidated return; and the extent to which and the manner in which net losses sustained during the period for which the consolidated return is filed shall be deducted in any taxable year after the affiliation is terminated in whole or in part; (4) the extent to which and the manner in which gain or loss is to be recognized, upon the withdrawal of one or more corporations from the group, by reason of transactions occurring during the period of affiliation; and (5) that the corporations filing the consolidated return must designate one of their members as the agent for the group, in order that all notices may be mailed to the agent, deficiencies collected, refunds made, interest computed, and proceedings before the Board of Tax Appeals conducted as though the agent were the taxpayer.

The next important change relates to the definition of an affiliated group. The pertinent sub-section reads as follows:

> (d) As used in this section an "affiliated group" means one or more chains of corporations connected through stock ownership with a common parent corporation if—
>
> (1) At least 95 per centum of the stock of each of the corporations (except the common parent corporation) is owned directly by one or more of the other corporations; and
>
> (2) The common parent corporation owns directly at least 95 per centum of the stock of at least one of the other corporations.
>
> As used in this subsection, the term "stock" does not include non-voting stock which is limited and preferred as to dividends.

This seems an excellent definition, provided one agrees with the 95 per cent limitation as a basis of affiliation. The limitation is merely a rule of thumb to simplify administration.

The requisites of the changed definition are—a chain or chains of corporations having a common parent corporation, in which the inter-relationship is based upon the ownership directly or indirectly by the common parent corporation of not less than 95 per cent of the stock of each corporation. That is to say, the common parent must own at least 95 per cent of

the voting stock of one of the subsidiaries which in turn must own 95 per cent in another subsidiary or subsidiaries, in the event that the parent does not own such 95 per cent, and so on through the list of subsidiaries. This definition provides for Class "A" consolidations only. Class "B" consolidations are no longer recognized. Under the 1926 law, a Class "A" consolidation is one in which at least 95 per cent of the stock in one or more corporations is owned by another corporation. A Class "B" consolidation involves ownership of at least 95 per cent of the stock of two or more corporations by the same non-corporate interest or interests.

A new provision making an exception to the prohibition contained in the 1926 Act against foreign corporations as members of an affiliated group is contained in Section 141 (h). This exception is to the effect that if there is a foreign corporation in the chain which is located in a "contiguous" foreign country, it may be treated for the purposes of affiliation as a domestic corporation at the option of such domestic corporation, provided 100 per cent (exclusive of qualifying shares) of its capital stock is owned or controlled directly or indirectly by the parent or one of the other members of the chain. It is important to note, however, that the corporation must have been organized in such contiguous foreign country and maintained solely for the purpose of complying with the laws of such country as to title and operation of property.

In addition to China Trade Act Corporations and corporations deriving a large percentage of their income from possessions of the United States, which were excluded from affiliation in the 1926 Act, an insurance company may not be affiliated with other classes of corporations under Section 141 (e).

Allocation of Tax

Subsection (i) of Section 141 is designed to avoid the difficulties which the Treasury recently experienced with Section 240 (b) of the 1926 Act. Prior to the decision of the Board of Tax Appeals in the *Mather Paper Company* case it was the Treasury's policy to include in the deficiency letter to the parent the income and tax liability for the subsidiaries whether or not there was an agreement as provided for in Section 240 (b). As a result of this decision of the Board and later decisions, the principle was established that, in the absence of such agreement, each subsidiary must have a deficiency letter and that the letter to the parent did not suspend the running of the statute of limitations for the subsidiaries. Not a few cases were outlawed on this basis. Section 141 (i) provides that if a deficiency notice is sent to one member of an affiliated group, this action suspends the running of the statute for assessment as to all of the group. Section 240 of the 1926 Act is amended to the same effect by Section 501 of the 1928 Act, but is not made retroactive. If the assessment statute is to be suspended, why did not Congress likewise suspend the running of the statute in respect of refund and credit claims? It should have done so, but it didn't.

Extension for Payment of Deficiencies

By Section 272 (j) for 1928 and subsequent years, the Commissioner is given greater latitude in granting extensions for the payment of deficiencies. Under the 1926 Act he could

grant an extension of eighteen months from the prescribed date of payment. The above mentioned section permits a further extension of twelve months in exceptional cases. By an amendment to the 1926 Act, carried as Section 502 in the present Act, this same privilege may be granted for taxable years prior to the taxable year 1928.

Suspension of Statutory Period

An amendment with respect to the suspension of the running of the statute during such time as the Commissioner is prohibited from making assessment or from beginning distraint or a proceeding in court with respect to any deficiency is contained in Section 277. The amendment is to the effect that the statute shall be suspended during such period "in any event if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final," and for 60 days thereafter. This is to cover cases where a petition has been docketed with the Board and the Board's order is that it does not have jurisdiction. In other words, if the Board never had jurisdiction, then the Commissioner was never in fact and in law prohibited from making assessment or beginning distraint or a proceeding in court and so the statute was not suspended. With the present amendment the statute would in any event be suspended while the petition was pending and for 60 days after the final order. By Section 504, Section 277 (b) of the 1926 Act is amended to the same effect, except that it does not affect cases where the period of limitations expired prior to the enactment of the 1928 Act.

Statutory Period for Assessment and Collection

The statute of limitations for assessment and collection has been changed in this Act not only with respect to taxes for 1928 and subsequent years but in other instances. For 1928 and subsequent years Section 275 (a) provides that the period of limitation for assessment shall be two years instead of three years.

Publicity of Returns

The provisions relative to the publicity of returns are the same as in the Revenue Act of 1926. The so-called Norris amendment which was added in the Senate was eliminated by the Senate after the House had refused to agree to it in the Conference Committee. It does not appear worth while to comment on this amendment since it failed. In view, however, of the widespread comment made on this provision, it was thought best to assure our readers that there has been no change in the publicity provisions of the income tax law.

Income

Instalment Sales

Congress has made a poor compromise on the instalment sales controversy. For 1928 and subsequent years the provisions of the 1926 Act are retained except that the amount of the initial payment permissible for the classification of casual sales and of sales of realty as instalment sales has been increased from 25 per cent to 40 per cent. Also, the Treasury's ruling that the sale of an item from inventory by one not a regular instalment dealer is not a casual sale within the meaning of the instalment provisions, has been

incorporated in the section relating to casual sales.

Despite the protests of instalment dealers and tax practitioners generally, Congress has written into the law the so-called "double taxation" feature which was put forward by the Board of Tax Appeals in the case of *Blums, Inc.*, and later covered in Bureau regulations. The law now specifically provides that in the case of a taxpayer changing from the accrual to the instalment basis, in computing income for the year of the change or any subsequent year, any amounts received during any such year on account of transactions made in any prior year shall be included as income in the year of receipt. Can Congress require taxpayers again to include in income something that they have already so included in a previous return? It can hardly be possible. If under the accrual method an item was properly taken into income, it instantaneously became surplus, or part of the taxpayer's capital. To endeavor again to tax the same item is to tax capital, not income.

Instalment Sales—Retroactive Provisions

In Section 705 Congress recognizes that income should not be taxed twice. It has provided that the Commissioner may not collect any deficiency which is based upon this double taxation rule, in those cases where on an original return filed prior to February 26, 1926, for 1924 or any prior taxable year, the taxpayer changed his method of reporting from the accrual to the instalment basis. This is fine as far as it goes, but the section also contains an extremely regrettable provision which is to the effect that if a tax has already been paid under the double taxation theory, no refund in respect of such tax shall be allowed unless under the double taxation theory the taxpayer has actually overpaid its tax.

There can be no good reason for the differentiation which Congress has made. The method is equally erroneous as to those taxes which have been paid and those which have only been proposed as deficiencies. A taxpayer's liability should not be made to turn on a question of payment. The basis for his liability should be more fundamental. True, those taxpayers who have paid their assessments may go into court and seek redress, provided they are not barred by statute, but such action and the expense necessarily attendant thereupon should not be required in the face of an admission by Congress that tax should not be collected on the double taxation principle for the same years.

In justifying its action in this matter, the Committee showed unusual respect for the action of the courts when it is considered that in some other retroactive legislation in the bill it was attempting to upset court decisions. The language referred to is as follows:

> The Committee does not deem it desirable retroactively to validate or invalidate such construction (decision of the Board of Tax Appeals in the *Blum* case) but leaves the matter to judicial determination.

Instalment Sales—Loss or Gain

Section 44 (d) is designed to prevent evasion of taxes in this connection with the disposition of instalment obligations by the obligee. It provides that if an instalment obligation is satisfied at other than its face value or distributed, transmitted, sold or otherwise disposed of, gain or loss shall result to

the extent of the difference between the basis of the obligation and in case of satisfaction at other than face value or a sale or exchange, the amount realized; and in case of a distribution, transmission, or disposition otherwise than by sale or exchange, the fair market value at the time of disposition. The basis is the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full.

Consolidation of Accounts

Section 45 of the new act changes Section 240 (f) of the Revenue Act of 1926 providing for the consolidation of accounts of related trades or businesses, so as to show a clear intention that this section is not to be considered means of securing the results of a consolidated return. This section now provides that in the case of two or more trades or businesses whether or not incorporated, whether or not organized in the United States, and whether or not affiliated, owned or controlled directly by the same interests, the Commissioner may allocate gross income or deductions between or among these trades or businesses in such a way as he deems necessary to prevent evasion of taxes or to clearly reflect the income of any such trades or businesses. In the prior act it is required as a basis for consolidation that the trades or businesses must be related. For the purpose of Section 45 relationship as to the kind of business is not a requisite, it only being necessary that the trades or businesses be owned or controlled directly or indirectly by the same interests.

Section 240 (f) of the 1926 Act made it mandatory for the Commissioner to consolidate accounts at the request of the taxpayer provided, of course, it was necessary in order to show an accurate distribution or apportionment of gains, profits, income, deductions or capital between or among such businesses. Section 45, however, merely authorizes the Commissioner to take such action if he deems it necessary to prevent evasion and to arrive at the true tax liability of the several businesses.

There is considerable doubt whether Congress can violate contractual relationships and disregard the separate identity of corporations. This provision is no doubt directed primarily at foreign corporations.

Exempt Income

Two additional classes of exempt income are recognized by the new law. The House bill proposed to relieve from taxation the compensation of teachers employed by the territorial Governments of Alaska and Hawaii. The Senate bill extended this exemption to apply to all territorial employees. However, in the bill as passed, the provision covers only territorial teachers employed by the governments of the two territories.

By Section 116 (e) the earnings from the operation of bridges to be acquired by any State or political subdivision are to be exempted from tax under certain conditions. This provision deals with the situation where a State or political subdivision, pursuant to a contract entered into before the enactment of the Revenue Act of 1928 and to which it was not a party, is, in the future, to acquire a bridge, the payment for which, in whole or in part, is to be made out of the earnings from the operation of the bridge. So much

of the tax on the net income as is attributable to the earnings which would accrue to or for the benefit of the State or political subdivision if such earnings were not taxable under the Revenue Act of 1928, are to be refunded to the State or political subdivision. It is provided, however, that no such refund is to be made unless the entire amount of the refund is applied toward the purchase price of the bridge. The Conference report states that this amendment is made to fit cases such as the St. Charles River (?) Bridge.

Income from Sources Within United States

Income derived by a foreign central bank of issue from banker's acceptances is by a new provision in Section 119 (a) (1) (C) (formerly Section 217 and Section 233 (a) of the 1926 Act), exempted from being treated as income from sources within the United States. This amendment was stated by the Senate Finance Committee to be in the interest of the development of a dollar acceptance market.

Basis for Determining Gain or Loss

Section 111 (b) of the new act makes a change as to the adjustment of the basis in computing the amount of gain or loss from the sale or other disposition of property. Section 202 of the Revenue Act of 1926 provided that proper adjustments should be made for any expenditure, or item of loss properly chargeable to capital account. Section 111 (b) states that proper adjustment shall be made for any expenditure, receipt, loss, or other item properly chargeable to capital account. The words "receipt," "loss," "or other item" takes the place of the words "or item of loss" as set out in the 1926 Act. The words "receipt" and "other item" permit adjustment for various transactions that may occur with respect to property other than expenditures and losses.

Sub-section 111 (b-3) is new and provides that in the case of stock the basis shall be diminished by the amount of distributions previously made in respect of such stock to the extent provided under the law applicable to the year in which the distributions were made.

The provisions relative to the basis for determining gain or loss upon the sale or other disposition of property acquired after February 28, 1913, have been modified with particular reference to gifts, transfers in trust, and property transmitted at death. Section 113 (a-3) modifies the provisions of Section 204 (a-3) of the 1926 Act relating to transfers in trust after December 31, 1920, so as to include within the paragraph all classes of transfers in trust (not by a bequest or devise) made after December 31, 1920, even if made in contemplation of death or to take effect in possession or enjoyment at or after death. The basis thus provided is the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of the loss recognized to the grantor under the law applicable when the transfer was made. By striking out what was the last sentence of Section 204 (a-3) the effect is to make the basis in the case of gifts in contemplation of death or to take effect in possession or enjoyment at or after death, if made after December 31, 1920, the same as the basis which the property would have in the hands of the donor or the last preceding

owner by whom it was not acquired by gift.

Section 113 (a-5) substantially changes the basis provided in Section 204 (a-5) of the 1926 Act. Section 204 (a-5) provided that the basis to be used in determining gain or loss on the sale of property by an estate should be value at the date of acquisition. The word "acquisition" is indefinite and has given rise to controversy. The Treasury held that the word "acquisition" meant the date of death. The Board of Tax Appeals held in *Appeal of Matthiessen*, 2. B. T. A. 921, that a legatee acquired such property when distributed. Such was also the holding of the Court of Claims. Again, the Board held that the executor acquired the property at death. The Court of Claims, however, in the case of *McKinney vs. U. S.* (certiorari denied by the U. S. Supreme Court) held that the basis for the executor or administrator is the same as the basis for the decedent. Subsequent to the denial of certiorari by the Supreme Court, the Treasury issued decisions 4010, 4011 and 4012, which changed the prior rulings so as to provide that the basis should be the same as the property would have had if the decedent had sold it. This caused confusion and injustice. The House bill attempted to settle the confusion by providing that in such cases the basis should be the fair market value of the property at the date of death of the decedent. This ruling was obviously unfair because there are many instances where property passes at death but to which the beneficiaries, legatees or devisees do not have or acquire title until many years after the death of the decedent. It is obviously unfair both to the Government and to the taxpayers to take the basis at date of death when there may have been, in the interim between the death of decedent and the actual distribution of the property, either a considerable appreciation or depreciation in the value of the property.

The Senate bill corrected this situation by taking cognizance of the actual happenings with respect to the transmission of property at death, and amended the section as it now appears in the law. Subsection 113 (a-5) as passed provides that in case of a specific bequest of personal property or a general or specific devise of real property or where realty is transmitted by the intestate laws, the basis shall be the fair market value of the property at the time of the death of the decedent. This rule is proper since in such cases the property for all practical purposes, vests in the beneficiary immediately upon the decedent's death. The same rule is applied to real and personal property transmitted by the decedent where there is no direct beneficiary but the property is sold by the executor.

In all other cases the basis provided is the fair market value of the property at the time of distribution to the taxpayer. This rule is likewise proper since it takes into consideration the actual date upon which the beneficiary receives title to the property. The Senate Committee in its report stated that this rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest but by general bequest or by intestacy, and also in cases where the executor purchases property and distributes it to the beneficiary.

A special rule is provided in Section 113 (a-5) by which to determine

the basis of property transferred by a trust revocable by the grantor at any time where the sale or other distribution of the property occurs after the death of the grantor. This rule includes sales or other dispositions by the trustee and also by a beneficiary of a trust and has been invoked because Congress recognizes that for all practical purposes the property belongs to the grantor rather than to the beneficiary. Therefore, for the purpose of determining gain or loss on the sale or other disposition of the property after the grantor's death by the trustee or by the beneficiary the property is treated as vesting in the beneficiary according to the terms of the trust instrument not at the date of creation of the trust but rather on the date of the grantor's death. Accordingly it is provided that the basis of such property in the hands of the beneficiary after the grantor's death shall be the same as if the trust instrument had been a will executed on the date of death.

Basis in Reorganization

Sections 113 (a-7) and 113 (a-8) are in general the same as sections 204 (a-7) and 204 (a-8) of the 1926 Act except that they contain a change which was necessary to kill a "joker" in the 1924 and 1926 Acts. This "joker" was pointed out by Colonel Montgomery shortly after the passage of the 1924 Act. Section 204 of the 1926 Act and section 113 of the 1928 Act contain provisions as to the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913. Subsections (6), (7) and (8) of section 204 (a) in the 1926 Act were designed to prevent the stepping up of the basis by making exchanges in corporate reorganizations and required that the basis for gain or loss should be the same as it was in the hands of the transferor. Apparently by oversight, the language of these subsections still permitted in certain kinds of reorganizations a realization of appreciation without tax, the very thing which the subsections were designed to prevent. Sections 113 (a) (7) and 113 (a) (8) of the 1928 Act now provide clearly that the basis shall be the same as in the hands of the transferor, adjusted (as also provided in the 1924 and 1926 Acts), to take into account any taxable gain or deductible loss previously recognized.

In the House bill these changes were made retroactive. This would have had the effect of changing the basis upon which such reorganizations had been carried through since June 1924. The Senate, however, changed the bill so that the new provisions apply only to transactions effected after January 1, 1928. We believe that this legislative history confirms Colonel Montgomery's construction of the 1924 and 1926 Acts.

Section 113 (a-12) provides a basis for loss or gain on property acquired during the period of affiliation by a member of an affiliated group through inter company transactions from another corporation of the group. This is an entirely new provision in the law. The section itself does not prescribe the basis but delegates to the Commissioner power to prescribe rules legislative in character under which gain or loss after affiliation will be recognized including the adjustments necessary for depletion and depreciation. As a guide to the Commissioner in making these regulations, it is pro-

vided that intercompany transactions shall be disregarded if gain or loss was not recognized. The term "period of affiliation" is defined to mean the period during which the corporations were determined to be affiliated under the law then applicable. It does not include any taxable year beginning on or after January 1, 1922, unless a consolidated return was made, nor any taxable year after the taxable year 1928. For years after 1928, the basis is to be determined in accordance with the regulations governing consolidated returns to be issued by the Commissioner under the provisions of Section 141 (b).

Credits and Deductions

There have been several rather important changes in the Act with respect to credits and deductions. For individuals there has been a slight change in the earned income credit, but this has such a negligible effect upon the tax that it is scarcely worth mentioning. Section 31 (a) provides that the maximum credit allowed for earned income shall be $30,000 instead of $20,000 as in the 1926 Act.

Taxes assessed against local benefits have long been unallowable as a deduction in computing net income. Section 23 (c-3), however, provides that in so far as such taxes represent charges for interest and maintenance they shall be deductible. This provision, however, is scarcely of general use. It is understood that it was inserted to take care of taxes assessed by drainage districts.

By Section 23 (c) Congress has sought to settle the uncertainty with respect to the deduction for estate, inheritance, legacy and succession taxes. This subsection provides that such taxes shall be allowed as a deduction only to the estate. Heretofore the Treasury has taken the position that the deduction of such taxes must depend upon the incidence of the tax. If the incidence of the tax is against the estate, the estate is entitled to the deduction. If it is against the beneficiary, the deduction is to the beneficiary.

The difficulty encountered under prior acts should be eliminated in view of the provisions of Section 703, which are to be applied retroactively. Under such Section if the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate, or vice versa. If the deduction has been claimed both by the estate and the beneficiary it shall be allowed to whichever actually paid the tax. If the deduction has been claimed by neither the estate nor the beneficiary, it shall also be allowed the one who actually paid the tax, provided the claim for the deduction was made within the statutory period.

Notwithstanding the provisions as to who shall be entitled to the deduction, if the claim made by the estate is barred, but the statute has not run as to the beneficiary or if the statute has run as to the beneficiary, but not as to the estate, then the deduction shall be allowed to the one in respect of whom the statute has not run.

The use of the word "claimed" by Congress is specifically limited to mean claimed in the original return of either the estate or the beneficiary, or in a claim for abatement filed prior to June 2, 1924. Also, Section 703 is specifically limited so that it shall not apply to a case which has been passed upon by the Board of Tax Appeals or by any court, whether or not the decision of either body has become final. The

deduction is applicable to succession taxes, whether they be federal or imposed by a state, territory or a foreign country.

All estates and beneficiaries should immediately ascertain whether they are affected by Section 703. If they are affected, prompt action should be taken wherever possible to file such claims as are necessary prior to the expiration of the statutory period therefor.

Depreciation and Depletion—Life Estate and Trusts

Section 3 (a) (k) and (l) attempts to settle another question which has been mooted under prior laws. The 1926 Act provides with respect to the deduction for depreciation and depletion, where life estates and trusts are concerned, that the deduction shall be equitably apportioned between the life tenant and the remainderman, or the trustee and beneficiary. This provision is uncertain of application and has resulted in considerable hardship in these two classes of cases under that law. The two subsections of the new act referred to provide that, in the case of the life tenant and remainderman, the deductions shall be computed as if the life tenant were the absolute owner of the property on the basis of the estimated useful life of the property, and the deduction allowed for each year that the life tenant holds the property. In the case of property held in trust, the allowable deductions are to be apportioned between the income beneficiaries and the trustee in accordance with the terms of the will, deed or other instrument creating the trust. In the absence of specific provisions in the document creating the trust, the deductions are to be apportioned on the basis of the trust income allocable as between the beneficiaries and the trustee. These provisions are not retroactive in their effect.

Employee Benefit Trusts

An entirely new deduction is granted in the case of trusts established by employers for the exclusive benefit of some or all of their employees. Under the 1926 Act a trust created by an employer as part of a stock bonus, pension or profit sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by the employer or the employees or both, the ultimate purpose being to distribute the earnings and principal of the fund to the employees often in the form of stock or securities purchased under the plan, was exempt from tax. Nevertheless under the 1926 Act the employees were taxed upon distributions from such fund not only upon the amount contributed to the trust by the employer and the dividends or interest distributed to the employees, but also upon all unrealized appreciation in the value of the stock or securities when received from the trust. The 1928 Act in Section 165 corrects this situation by providing that upon such distribution the taxpayer shall not be taxed upon any appreciation in the value of the stock over the cost to the trustee unless and until the gain is actually realized. He is, of course, taxable on all other increments to the stock such as dividends, interest, etc.

Section 23 (q) also provides that, where such trusts have been established and are exempt from tax under Section 165, there shall be allowed as a deduction (in addition to the contributions to such trust during the taxable year to cover the pension liability accruing during the year, allowed as a deduc-

tion under Section 23 (a)), a reasonable amount transferred or paid into such trust during the taxable year in excess of contributions provided such amount has not been previously allowed as a deduction and provided it is apportioned ratably over a period of ten years beginning with the year in which the transfer or payment was made.

With respect to the provision the Senate Finance Committee in its report states:

> A considerable number of business concerns, however, established pension plans for the benefit of their employees a good many years ago, under arrangements by which the company set aside a pension reserve fund, to which annual additions were made, the reserve fund not being turned over to a trustee. The yearly additions to such reserve funds were not deductible for income tax purposes. These employers now desire to adopt the more satisfactory plan of turning over the pension reserve funds to trustees to hold for the benefit of their employees. Under existing law, no deduction would be allowed for such a transfer representing past accumulations, though distributions from the fund are taxable to the employee as additional compensation. The committee proposes an amendment in section 23(q) which permits such reserve funds to be turned over to a trustee and allows the amount thereof to be prorated as a deduction over a period of years equivalent to the time during which the reserve fund was accumulated. This prevents the employer from taking the entire deduction in the year of transfer and operates equitably to the employer and to the Government.

In the law as finally enacted, instead of the deduction for the amount transferred to the trustee being spread over a period equivalent to the time in which the reserve fund was accumulated, it is to be apportioned in equal parts over a period of ten consecutive years.

Contributions

By a retroactive enactment contained in Section 706 it is provided that in computing the net income of any individual other than a non-resident alien for the taxable year 1923, any contributions or gifts to or for the use of a trust organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, shall be allowed as a deduction provided such individual made contributions or gifts to the same trust and in substantially the same amount during the year 1924 and provided such deduction is not in an amount in excess of $50,000. This deduction is subject to the percentage limitation prescribed in Section 214 (a-11) of the Revenue Act of 1921. It is also provided that any overpayments due to retroactive allowance of this deduction shall be credited or refunded provided the statutory period of limitations has not barred such refund or credit. This provision sounds as though it had been devised to fit some special case.

Specific Corporation Credit

The specific credit of $2000 for domestic corporations having a net income of $25,000 or less is increased by section 26 (b) to $3,000. However, if the net income is more than $25,000, the tax imposed by Section 13 shall not exceed the tax which would be payable if the $3,000 credit were allowed plus the amount of net income in excess of $25,000.

Deductions Proposed But Eliminated

There were several other credits and deductions which failed of final enactment. The House bill proposed that the owner or long term lessee of a co-

(*Continued on page* 20)

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The 1928 Law

During the passage of the 1909, 1913, 1916, 1917, 1918, 1921, 1924 and 1926 laws I followed the procedure in the House and Senate so closely that by the time the law became effective, I had rather definite convictions regarding most of the provisions.

The 1928 law is such a departure from the previous laws that I hesitate to pass judgment upon it in advance. In some respects I can see obvious improvements, in other respects I regret that deficiencies in previous laws have not been corrected. On the whole there is more than an even chance that when we become familiar with the new law we will find that it is the best one we have had.

Usually it is a waste of time to make comments which do not include at least one helpful, constructive suggestion. I am embarrassed at not doing so in these comments unless this one will relieve me of the charge of violating the rule. In preparing federal tax returns always remember that as to any item of income, or deduction from income, *about which there is the slightest doubt* steps should be taken *at the time* to protect one's interest. During the last year Supreme Court decisions have reversed Treasury rulings which affect nearly every taxpayer for 1913 and subsequent years. But how many taxpayers will receive refunds for years as late as 1921? And how many for years prior to 1921?

My suggestion is that as to the doubtful provisions of the 1928 law taxpayers be more alert to protect their interests than they have been under former laws.

R. H. M.

Income Tax Act of 1928

(*Continued from page 18*)

operative apartment might deduct his share of the interest and taxes payable by the corporation operating the apartment. This provision was eliminated by the Senate on the grounds that it was not practical of administration and was not altogether fair in its provisions. The Senate also had provided that taxpayers might deduct expenses incident to tax adjustments which embraced all expenses paid or incurred in contesting the liability of any tax whether federal, state, municipal or otherwise, which are not deductible as business expenses. The purpose as stated by the Senate was to place individuals on a parity with corporations so far as this item of expense is concerned. Evidently the Conference Committee deemed this would give entirely too much encouragement to tax practitioners and would place the business upon the contingent fee basis.

Board of Tax Appeals

By specific amendments to the 1924 Act, certain changes have been made in the procedure and jurisdiction of the Board of Tax Appeals. Also the provisions with respect to court review of the Board's decisions have been slightly modified. Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, have been further amended by Section 601 of the new law to clear up the situation caused by the decision of the Court of Appeals of the District of Columbia in the *McCandless* case relative to the decision of cases by a division of the Board. Under Section 906 (a) a division was required to hear and decide a proceeding assigned to it by the Chairman. This was interpreted to mean that the decision of the division was a preliminary decision and that it did not become the final decision of the Board until reviewed by the Board. However, in the *McCandless* case the Court held that the decision of the division was final unless reviewed by the Board on a specific order of the Chairman for review. The court said a general order of procedure reviewing all cases was not sufficient to comply with the law.

The amendment contained in Section 601 of the present Act makes it clear that it is the duty of the division to "hear and make a determination upon" a proceeding assigned to it and "to make a report of any such determination which constitutes its final disposition of the proceeding." The provisions as to review are left as before. It is further provided that the report of the division where the case is reviewed by the Board shall not become part of the record in the case. Under the Court of Appeals interpretation of the 1924 Act, as amended, in the *McCandless* case it was held that the report of the division did become a part of the record and mandamus was granted requiring the report of the division to be made the report of the Board.

By its rules the Board has always placed the burden of proof upon the taxpayer except for new matter raised by the Commissioner in his answer. This rule even applied to the allegation of fraud which is an indictable offense. At least in so far as it applies to fraud, this rule has always been considered unjust and contrary to the established principles of law and procedure. Congress has finally taken cognizance of this situation and Sec-

tion 907(a) of the 1924 Act has been amended so as to place the burden of proof on the Commissioner whenever fraud is alleged.

The burden of proof in the so-called transferee cases has also been placed where it belongs. The new law in Section 602, which amends Sections 912 and 913 of the 1924 Act as amended, puts the burden upon the Commissioner to show that the petitioner is a transferee. Once this is established, however, the burden is on the petitioner to show that he is not liable in law or in equity for the taxes of the taxpayer, i.e., the transferor.

It is believed that Congress should have gone further than it did with respect to the burden of proof. The general rule of the Board should be further restricted. It should not be the duty of the taxpayer to do anything more than prima facie establish his return. As in the transferee case, the burden should then be upon the Commissioner to establish the basis of his deficiency. Of course, if the taxpayer brings in new issues not covered by his return he should carry the full burden. It has been said that it would be too difficult for the Commissioner to establish the correctness of deficiencies. We say that it is far better that it be difficult for the Government, which has the whole resources of the Nation back of it, to sustain deficiencies, than it should be for individual citizens who in many instances can ill afford to take such burden. The great number of so-called "lack of evidence" decisions issuing from the Board is plain proof of itself that something is wrong. We know of no other tribunal operating under rules of evidence which issues such decisions and it is directly attributable to the rule as to burden of proof. Long ago judicial tribunals, following the common law system, ceased to require the proof of a negative except a negative pregnant. This latter, furthermore, is not a real negative but merely an affirmative dressed as a negative. It is clear that in tax cases the common law rule that he who affirms a fact has the burden of proving it cannot be applied in its full rigor. Taxpayers should, in the nature of things, be required to sustain the basis of their returns, but they should not be required to do this by a preponderance of evidence and certainly not by the criminal rule of "beyond reasonable doubt" which would appear to have been adopted in a number of Board decisions. If there is any deficiency this should be established prima facie by the Commissioner.

A further provision to perfect the procedure in transferee cases is contained in Section 602 as an amendment to Section 913 of the Revenue Act of 1924 as amended. This section as it now exists makes it possible for a transferee to secure access to the books, records, and documents of the transferor for a preliminary inspection thereof for the purpose of preparing his case. The method by which this is to be accomplished is to be determined and prescribed by the Board in its rules. It is also provided that upon application to the Board, for good cause shown, the transferee may secure a subpoena for the production before the Board of any such books, records, and documents of the transferor as may be necessary to enable the transferee to establish his case. There is some doubt as to whether this provision is not subject to attack as being unconstitutional or subject to attack

for lack of jurisdiction. It is seriously doubted whether the Board can be vested with the power here sought to be given. Section 617 of the Act regarding the jurisdiction of the Federal Courts in tax cases will evidently be availed of to enforce this order in special cases.

The two changes affecting the so-called transferee proceedings mentioned hereinabove, have a deeper significance than is carried on the face of the Act or in the reports of the legislative committees in charge of the bill. They doubtless constitute an attempt to overcome the constitutional objections leveled against this class of proceedings. Most of these cases have been contested on the grounds that the provisions are extra-constitutional in that there is not first a determination by a court of equity that the transferee under the Act is in fact a transferee liable under the "trust fund doctrine" for the tax. The placing of the burden of proof on the Commissioner is a gesture to overcome this objection. It has been further objected that the constitution is otherwise violated in that the transferee is required to sustain tax returns made by another citizen. The provisions for access to the transferor's records were probably put into the act with this in mind.

The jurisdiction of the courts with respect to the review of the Board's decisions has also been changed somewhat. Section 603 of the Act modifies subsection (c) and (d) of Section 1001 of the Revenue Act of 1926 so as to require the filing of a bond to cover the tax, interest, or other additions thereto *on or before the time* the petition for review to the Circuit Court is filed. The change is in connection with the words just above underlined. Heretofore, the law did not definitely require the filing of the bond before or at the time of filing the petition for review in order to secure the stay of assessment and collection of the tax. By a parenthetical phrase which has now been omitted, there was a possibility that the bond might be filed after the petition was filed, provided this was done within six months after the final decision of the Board was rendered. If a so-called jeopardy bond was submitted to the Collector to stay a jeopardy assessment, the law does not require that a new bond be filed. Also, when such a bond has been filed and a portion of the tax is paid, the amount of the bond may be proportionately reduced.

Where a bond has not been filed and the tax has been paid pending final decision of the Board or the courts, it is now provided in the amendment to Section 1001 (d) contained in the 1928 Act, that any amount of the deficiency disallowed by such final order, shall be credited or refunded without the making of a claim.

Deficiencies

No change is made in the 1928 Act in the definition of a deficiency. It still may be said that a deficiency is the difference between the amount of tax proposed and the amount shown on the original return, *and which was admitted to be due when the original return was filed*, decreased or increased as the case may be by any subsequent additional assessments or overassessments. If, for instance, at the time an original return was filed the taxpayer also filed a claim for abatement of a portion of the tax shown by such return, the part covered by the claim for abatement clearly was not admitted

to be due, and therefore may not be included by the Commissioner as part of the basic assessment.

There are, however, changes in the procedure to be followed after a deficiency is determined by the Commissioner. Under the 1926 Act (Subsection 274 (f)) a second sixty day letter could be mailed to a taxpayer, provided no previous sixty day letter had been mailed *subsequent* to the enactment of the 1926 Act, i.e., June 2, 1926. Under Subsection 272 (f) apparently there can be no second sixty day letter, regardless of when the first was mailed, provided that a petition was filed with the Board on the first letter within the sixty days. Mathematical errors may still be corrected by the Commissioner and an assessment made therefor without his being required to issue a sixty day letter.

If a taxpayer desires to maintain a proceeding before the Board but at the same time pay his tax in order to stop interest running, eliminate the necessity of giving bond, or for any other reason, he may do so, under subsection 272 (d), by filing a waiver of the restrictions on the Commissioner prohibiting assessment and collection prior to a final order by the Board. Care should be taken that the waiver is only of restrictions on assessment and collection and that it does not include waiver of the right of appeal to the Board. While it is doubtful whether a taxpayer can waive this right, controversy on this point may be avoided at the outset by proper precaution. The waiver provision is not new to the 1928 Act.

Administrative

Period of Limitations

Whereas under the 1926 Act the period of assessment was decreased to three years, it is now further decreased by the 1928 Act to two years (Subsection 275 (a)). These limitations only apply to taxes imposed by those acts. Following are the limitation periods on all years, for assessments, commencing with 1917:

1917-1920	5 years
1921-1924	4 "
1925-1927	3 "
1928	2 "

As in the prior laws, the 1926 Act (subsection 275 (a)) provides that upon application the Commissioner may in certain cases further be limited in his time for making additional assessments, or for commencing a collection proceeding in court without assessment. Such instances are as follows:

In the case of,

(a) Income received during the lifetime of a decedent;

(b) Income of the estate of a decedent during administration;

(c) A corporation contemplating dissolution.

The limitation period in respect of the above, when a written request for assessment is made, is one year from the date of the written request. In the case of a corporation contemplating dissolution:

(a) The request must state that dissolution is contemplated at or before the expiration of the one year assessment period;

(b) The dissolution in good faith must be begun before the

expiration of such year, and

(c) The dissolution must be completed.

Otherwise, the request shall be ineffective to start the tolling of the one year period.

Apparently the dissolution may be completed at any time, not necessarily within the one year period, although it is definite that dissolution must be begun and completion contemplated by the end of the period. Congress probably realized that it is impossible to forecast a definite date of dissolution, and for that reason laid no time limit on the actual dissolution period.

By Section 503 of the 1928 Act the 1926 law is amended to provide for prompt assessment, the provisions being substantially the same as for 1928 and subsequent years.

Waivers

Under all previous laws a serious question has arisen in respect of the validity of waivers filed after the statute has run. Especially is this true when such waivers were filed after June 2, 1926, in view of the provisions of Section 1106 of the 1926 Act extinguishing the liability, as well as barring the remedy. Such uncertainty will apparently not exist in connection with waivers filed after the passage of the 1928 Act, for Section 276 provides that the period for either assessment or collection may be extended if the waivers are filed "before the expiration" of the limitation period. If extending waivers are to be effective, they also must be given before the expiration of the limitation period as extended.

The amendments to Section 278 (c) and (d) of the 1926 law contained in Section 506 of the 1928 law, make it clear that in the future assessments and collection waivers are illegal if secured after the expiration of the statutory period.

Subdivision (f) which Section 506 makes a part of section 278 of the 1926 law provides that a waiver, although secured after the expiration of the statutory period, "shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929." This is indeed a peculiar provision. Section 1106 provides that expiration of the statutory period extinguishes the liability. There is some question whether the taxpayer and the Commissioner can create or revive a liability by a waiver. Before executing waivers between the date of the passage of the 1928 law and January 1, 1929, taxpayers should make a careful check to determine whether the period has run. It would be desirable for taxpayers to insist upon the Commissioner advising whether or not the period has run, and state that it is not their desire to sign a waiver where the period has expired.

Section 506 (c) provides that:

> The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

This is a fair provision and does not take away vested rights. On the other hand, it does not declare invalid those waivers now on file which were submitted after the period had expired. This means that taxpayers will be required to test out the validity of waivers filed after the expiration of the

statutory period, but prior to the enactment of the 1928 law. No explanation has been made why Congress decided to treat late waivers secured between the date of the 1928 law and January 1, 1929, on a different basis.

Claims Against Transferees and Fiduciaries

It is impossible to define in a few words what, or who, is, or is not, a transferee. That is a mixed question of law and fact and depends upon the peculiar circumstances in each case. Generally speaking, however, a transferee may be said to be a person or corporation who receives property of another for a grossly inadequate, or no, consideration. For instance, a liquidating stockholder probably in every instance would be held to be a transferee, within the meaning of the Revenue Act of 1928.

Section 311 permits the Commissioner to collect from a transferee of assets any tax liability of the predecessor owner of such assets in the same manner as if it were the taxpayer. On the other hand the transferee has the same rights of procedure and defense as if it were the taxpayer. It is entitled to a sixty day letter and to take an appeal to the Board. It may pay the tax and sue for recovery, if it elects not to appeal to the Board. On trial it may present any defense or claim which the taxpayer might have adduced.

The statutory period within which assessments may be made against a transferee is governed by the period during which assessments may be made against the transferor. In the case of an initial transferee the period is "within one year after the expiration of the period of limitation for assessment against the taxpayer" (Section 311). If the liability is that of a transferee of a transferee, the period against the second transferee is one year from the date of expiration of the period against the preceding transferee. But regardless of the number of transferees, the maximum period for assessment is three years from the expiration of the period for assessment against the taxpayer. There is one exception to all of these limitation provisions. If before the expiration of the period for assessment against the transferee, a court proceeding has been begun either against the taxpayer or the last preceding transferee, the limitation period of the final transferee expires one year after the return of execution in the court proceeding.

The provisions above in respect of the liability of a transferee of a transferee are novel to the 1928 Act.

Another novel provision is Section 311 (b) (3) which places a special limitation period on fiduciaries. If the fiduciary takes any action by way of disposition of assets over which he is acting in a fiduciary capacity, or otherwise, to render himself personally liable, the Government may make an assessment against him within one year from the date this personal liability arises, "or not later than the expiration of the period for collection of the tax in respect of which such liability arises" whichever is the later. The law is not clear as to what collection period is meant in the part quoted above, but apparently it is intended to apply to the collection period against the initial taxpayer. The report of the Ways and Means Committee on the bill as presented to the House bears out this construction.

As in the case of a taxpayer, the

running of the statute against a transferee or fiduciary is suspended while the Commissioner is prohibited from making an assessment against them, and during the period a proceeding is docketed in the Board, and for sixty days thereafter. By Section 505 the 1926 Act is amended to this same effect, except that it does not affect cases where the period of limitations expired prior to the enactment of the 1928 Act.

Care should be taken that changes of address, the creation of a fiduciary relation, etc., are reported to the Commissioner. Otherwise the Commissioner may bind the fiduciary by simply mailing a notice to the person subject to the liability at his last known address (Subsection 331 (e)). Of course, the notice might eventually reach the fiduciary. On the other hand, it might not or its receipt by him might be delayed, to the prejudice of the interest of his trust.

The Supreme Court of the United States has never passed upon the constitutionality of the transferee provisions in the 1926 Act. Until it does all transferees should take such steps as are necessary to protect their interests pending a decision. In his *1927 Income Tax Procedure* Colonel Montgomery clearly expressed his doubts on the constitutionality of these provisions. These doubts were confirmed in the case of *Owensboro Ditcher & Grader Co., v. Lucas*, 18 Fed. (2d) 798, which held Section 280 of the 1926 Act unconstitutional. It is understood that the Government did not appeal this decision.

Section 604 provides that no suit or proceeding may be maintained to restrain the assessment or collection of the liability of a transferee or fiduciary.

Retroactive Regulations

Under the 1926 law the Commissioner was permitted to reverse previous regulations without that reversal being retroactive, provided such reversal was not occasioned by a final court decision. Section 605 is amendatory of the 1926 Act and provides that the regulations may be amended without retroactive effect regardless of whether or not the change is due to a court decision.

The Senate Finance Committee apparently failed to grasp the true purport of the provision in the 1926 law, for it stated in its report to the Senate:

> Fundamentally there is no difference in the two cases which can justify the restrictions in Section 1108(a) of the 1926 Act.

Fundamentally there is a difference. In many instances a change may be in respect of a discretionary matter or it may simply pertain to procedure. But if it is decided by a court of competent jurisdiction that a regulation is contrary to the law, that regulation was contrary to the law *ab initio*. It was an improper regulation from the beginning and taxes collected while it was in force undoubtedly were erroneously and illegally collected. As the regulation is erroneous each taxpayer may go into court, within the statutory period, and recover the tax illegally paid. Why should this be necessary? Does Congress wish to advocate a multiplicity of suits? Does Congress wish to retain in the Treasury money illegally collected? Its apparent purpose is to keep cases closed. This purpose seems to be observed against taxpayers, but it is forgotten when it results to the disadvantage of the Treasury.

Closing Agreements

There is quite a substantial change in the provisions relating to closing agreements. Under all prior acts such an agreement was required to be signed by the Commissioner and approved by the Secretary of the Treasury. Section 606 of the 1928 Act permits the Commissioner to authorize officers or employees, whether they are in the departmental or field service, to enter into such agreements with taxpayers. It is still provided that the agreement before becoming final must be approved either by the Secretary or the Under-secretary of the Treasury. Taxpayers should be advised not to enter into final agreements with agents of the Commissioner unless they have specific evidence of the agents' authority to make agreements.

The purpose of the present change is to expedite the consummation of closing agreements. Congress was of the opinion that restrictions in the prior acts caused such delay that taxpayers were reluctant to make applications. Whether the present provisions are such as to eliminate the cause of the delay remains to be seen. Under the previous acts experience has proven that it was not the intricacies of the law which were responsible for the time expended in accomplishing agreements. On the contrary, most of the delay was due to administration. Unless and until curative administrative action is taken, changes in the law will avail naught. Naturally care must be taken to assure Treasury officials that each agreement is accurate, but there is no reason why this assurance cannot be gained with expedition as well as through delay.

Section 1106 (b) of the Revenue Act of 1926, which provided for closing agreements, is repealed by the Revenue Act of 1928, effective on the expiration of thirty days from May 29th. It is specifically provided that this repeal shall not affect any agreement made prior to the effective date of the repeal.

It is now provided that in any suit, action or proceeding a closing agreement shall not be annulled, modified, set aside or disregarded. This is a distinct change from prior acts which simply provided that no suit, action or proceeding to annul, modify or set aside should be entertained by any court in the United States. Nothing in the previous acts prevented a court from setting aside a closing agreement, provided the closing agreement was only collaterally involved in the proceeding. In at least one instance an agreement was in effect disregarded, although the equities of the situation were such that the court was probably justified in taking the action which it found possible under the law.

Effect of Expiration of Limitation Period

Congress has assumed that Section 1106 (a) of the Revenue Act of 1926 is unworkable. Probably this assumption is correct. In any event the section has been repealed, the repeal being effective as of the date of the Revenue Act of 1926. In lieu of a provision that the bar of the statute against the Government shall not only be effective as to remedy, but shall also extinguish the liability, Section 607 provides that if any tax, or addition thereto such as interest, penalty, etc., is assessed or paid after the statute of limitations has run, it shall be considered an over-

payment and shall be credited or refunded, provided a timely claim is filed. The provision is retroactive in effect.

The words assessed or paid were probably used in Section 607 to make it clear that there was an overpayment if the tax was assessed after the limitation period on assessment had expired or was paid after the limitation period on collection had expired.

Whereas Section 607 prescribes the rights of a taxpayer after the statute has run against the Government, Section 608 defines the rights of the Government when the statute has run against the taxpayer. It provides that a refund shall be considered erroneous:

(1) If made after the statute had tolled, if a proper and timely claim was not on file;

(2) If a claim properly and timely made was disallowed by the Commissioner, after the passage of the 1928 Act, but later was reopened and refund was made after the time for filing suit had expired, unless

(a) Within the period for instituting suit, a suit had been begun; or

(b) Within the time for instituting suit, the taxpayer and Commissioner agree in writing to suspend the running of the statute of limitations for filing suit, until a final decision is rendered in a named case pending before the Board or in the courts.

Another new provision is that involving suspension of the running of the statute. Apparently the agreement to be entered into need not stipulate that the taxpayer will be bound by the case to be decided, or that his suit, if filed, will be limited to the issues involved in the "named" cases. The Commissioner may be able to control such a situation by restricting the form of agreement. Taxpayers should be very guarded in affixing their name to any such agreement, as they have much to lose and little to gain. Of course, if there is only a small amount of tax involved, which would not warrant the expense of suit, or if their claim is in respect of a principle already on the way to a decision in a test case, an agreement such as the statute contemplates might serve their temporary needs and adequately protect their interests.

Erroneous Credits

The Commissioner in the past has indulged in a practice of crediting overassessments against assessments which, legal when made, were uncollectible when the credit was applied. By this action he was doing indirectly what he was prohibited from doing directly. Under Section 609 he is now prohibited from taking such action, and in those cases where it has been done, taxpayers may recover the amount of the credit, provided the period for filing a claim has not expired. This section specifically provides that any credit by the Commissioner shall be *void,* not voidable, if payment of the tax against which the credit is made would be an overpayment under the statute.

Section 609 likewise provides that credit of an overpayment shall be considered void if a refund of such overpayment would be considered erroneous under the statute. This provision will not be invoked in many instances,

as erroneous overassessments are rare. The situation may arise, however, that the Commissioner will make an erroneous credit and, upon his discovery that the credit is void, he will seek to collect the tax against which the credit was made. If much time has elapsed before discovery of the error, it is quite possible that the period for collection of the tax has expired. The law makes no provision for a case of this character, so apparently the taxpayer would be as well off as if the credit had been valid.

Recovery of Erroneous Refunds

If the Government wishes to recover refunds classed under Section 608 as "erroneous refunds" it must institute suit within two years from the date the refund was *made*. If the refund was erroneous, but does not come within the classification designated in Section 608, suit must be instituted before the expiration of two years after the *making* of the refund or before May 1, 1928, whichever is the later.

These limitations are entirely new, none of the previous recent revenue laws having contained provision for the recovery of erroneous refunds. It is unfortunate that Congress chose the word *made* in stating the time at which the period commences to run. When is a refund made? Who knows? It would have been much more desirable had the word "allowed," a defined term, been employed. The word made may be synonymous with allowed, but it is reasonably certain that the courts will have to decide the question.

Undoubtedly, if the statutory period within which assessment may be made has not expired, the Commissioner will reassess the tax erroneously refunded instead of proceeding to recover it by way of suit. In a suit the burden would be upon the Government to prove the refund was erroneous. In disputing an assessment the burden of proof is on the taxpayer.

Collections Stayed by Abatement Claims

In Section 611 we find one of the most pernicious forms of legislation of which Congress has ever been guilty. Such section provides that if a taxpayer has stayed collection of a tax, by filing a claim for abatement, payment of the part stayed whether "(made before or within one year after the enactment of this Act) shall not be considered as an overpayment" under Section 607.

There can be no justification for this provision. If Collectors failed to collect taxes covered by claims for abatement, it was their own dereliction. They knew or should have known that filing a claim for abatement did not suspend the running of the statute. Because of its negligence the Government permitted the statute to run, and now it has also run—to Congress seeking relief. Taxpayers who sought similar relief on the period for filing refund claims were denied, but the Treasury was successful.

Taxpayers should not abide by Section 611 without a fight. Section 1106 of the Revenue Act of 1926 extinguished the liability for taxes on which the statute had run. Notwithstanding the repeal of Section 1106 it is doubtful if Congress can restore such liability. All steps necessary to protect the interests of taxpayers affected by Section 611 should be taken until the courts decide just what rights the taxpayer has.

If the tax covered by a claim for

abatement has not been paid, apparently the Commissioner may not now collect it, if the statute has otherwise run. Section 611 simply pertains to refunds of taxes already collected. As this section was originally passed by the House it applied to all cases, whether or not collection had already been effected. The Senate eliminated the entire provision, but in conference the present section 611 was agreed to. In commenting on it the Conference Committee stated:

> The Senate amendment struck out this section; (original enactment) and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.

The effect of this section is to impose taxation on different bases—depending on whether the tax has or has not been paid. As was said in substance in connection with retroactive installment sales provisions, there is not a scintilla of logic to justify the line which Congress has drawn. Some one has said "There is nothing new under the sun." We challenge them to repeat such a statement after having read this section of the Revenue Act of 1928.

Repeal of Section 1106 (a)

Congress by Section 1106 (a) of the Revenue Act of 1926, provided that the bar of the statute of limitation should not only be effective as to remedy, but should also operate to extinguish liability. By Section 612 of the 1928 Act it attempts to repeal 1106 (a), the repeal to be effective as of February 26, 1926.

Can legal action now be taken in substance eliminating any effect which Section 1106 (a) may have had? It is well established that Congress may constitutionally change a limitation period, if the remedy only is affected, even though the statute has run. But when Congress has provided that the liability shall be extinguished, a different situation is encountered. Then substantial rights are affected, not merely procedural rights. In a situation somewhat similar to this the Supreme Court of the United States in *William Danzar & Company, Inc., v. Gulf & Ship Island Railroad Company*, 268 U. S. 633, held:

> The decision (*Campbell v. Holt*, 115 U. S. 620) rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the Statute of Limitations related to the remedy only, and that the removal of the bar was not unconstitutional. *That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only.* But such provisions sometimes operate as a limitation upon liability. This case belongs to the latter class. Section . . . will not be construed retroactively to create liability. *To give it that effect would be to deprive defendant of its property without the process of law, in contravention of the 5th Amendment.* (Italics supplied.)

It would appear that if the Treasury collects any taxes the liability for which has been extinguished, they may be recovered on the theory that the taxpayer's property was taken without due process of law.

Refunds and Credits

Claims for refund or credit of taxes imposed by the Revenue Act of 1928 must be made within two years after the tax was paid, to be effective (Section 322 (a)). This change to two years, from three years under the 1926 law, was made to be consistent

with the period for making additional assessments on 1928 and subsequent years. If the statute has run on a part, but not all of the tax to which the claim pertains, the claim shall be effective only as to that part on which it has not run. This would apply, of course, only where the tax was paid in installments; or where an additional assessment was made and paid.

Effect of Petition to Board

If a petition has been filed with the Board no refund or credit may be allowed in respect of the year involved and no suit for recovery shall be instituted except:

(a) To recover any overpayment found by the Board to have been made;

(b) To recover any amount paid in excess of the tax liability as finally determined by the Board;

(c) To recover any amount paid after the period for assessment or collection had expired. If the Board has passed on the statutory issue its decision shall be considered final.

Even in the exceptions noted above, no refund or credit shall be allowed unless the petition to the Board or a claim had been filed prior to the expiration of two years from the date tax was paid. (Section 322 (c)).

A provision of similar effect as the above, amendatory of Section 284 (e) of the Revenue Act of 1926, is contained in Section 507. By its provisions a refund may be allowed either if a claim was filed within the statutory period, or if a petition to the Board was filed within such period.

The effect of the provisions of both Section 322 (a) and 507 is to make the filing of a petition with the Board tantamount to the filing of a claim for refund with the Commissioner.

There should be no necessity for suit in respect of overpayments found by the Board. The law (Section 322 (d)) specifically authorizes the Board to determine the amount of any overpayment and mandatorily provides that such amount shall be credited or refunded to the taxpayer.

Prerequisites to Allowance

Before the Commissioner may make any refund or credit of an amount in excess of $75,000 he must make a report to the Joint Congressional Committee on Internal Revenue Taxes. This report must contain a summary of the facts and the decision of the Commissioner which resulted in the refund. After such report is made the Commissioner must wait until the expiration of thirty days before paying the refund.

The above changes the present procedure by reducing the period for consideration by the Joint Committee from sixty days to thirty days and by making it apply to both credits and refunds. Formerly it applied only to refunds.

Interest on Overpayments

A very meritorious change in respect of interest allowances is contained in Section 614 (a-2), which provides that upon the allowance of a refund, interest on such refund shall be allowed from the date of overpayment to a date preceding the date of the refund check by not more than thirty days. Heretofore interest ceased to run upon the signing of the first overassessment schedule by the Commissioner. In many instances this

antedated payment by as much as a year.

In the case of credits a very material change is made in the phraseology of the provision for computing interest. The law now reads, as did the 1926 law, that interest on credits shall be allowed from the dates of overpayment to the due date of the tax against which credit is taken, but, and here is a distinct change from the 1926 law, "if the amount against which the credit is taken is an additional assessment of a tax *imposed by* the Revenue Act of 1921" or a later Act, then to the date of the assessment of that amount. It will be remembered that Section 1116 of the 1926 law contained a provision almost similar to the above quoted provision, but instead of using the words "assessment of a tax imposed by" in the 1926 law, Congress used the phrase "assessment made under."

This change is apparently for the purpose of supporting the Treasury's interpretation of the 1926 act with reference to the date to which interest shall be allowed on overpayments which are applied against deficiencies for years prior to 1921. If the year of overpayment precedes the year of the deficiency, interest will be allowed only from the date of overpayment until the original due date of the tax for the year in respect of which the deficiency is determined. If the year of overpayment is subsequent to the year for which the deficiency exists no interest is allowable. In either of these cases if the deficiencies were paid and the overpayments refunded interest on the refunds would be allowed from the date of overpayment to within thirty days of date of payment of the refunds. The question of what is the "due date" of the tax deficiency is still to be judicially determined.

This is an example of the inequalities between taxpayers whose interests are substantially the same, but where, because of some chance situation, the administrative application of the law to one may be different than in the case of his neighbor.

The provisions of Section 614 are to be effective at the expiration of thirty days from May 29th and are to apply to any credit taken or refund made after that time, although allowed prior to such date. Section 1116 of the 1926 law is repealed, also effective thirty days from May 29th.

Interest on Judgments

As in the case of interest on refunds allowed by the Commissioner, interest on court judgments, by the provisions of Section 615, is now to be paid to a date not preceding the date of the refund check by more than thirty days.

Editor's Note

The foregoing article has been prepared by Messrs. Haynes, McGuire and Magathan of our Washington office. Since they are not only competent accountants, but also members of the Bar of the District of Columbia and of the United States Supreme Court, and have been specializing on tax matters for the past nine years, we believe that they are well qualified to comment on the new act. It may be of interest to our readers to know that Colonel Montgomery has acknowledged their assistance in the preparation of the successive editions of his well known work on Income Tax Procedure.